No. 11,185

IN THE

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

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WILLIAM COXON,

*Appellant,*

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

*Appellee.*

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# Appellee's Brief

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## STATUTES

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## CONCERNING STATEMENT OF THE CASE

Plaintiff's statement of the case is inaccurate in one respect, i. e., on pages 5 and 8 he states that he continued in defendant's employment until May 25, 1944, and that he was discharged on that date, whereas the date of discharge, as alleged in the complaint (R. 3, 4, 8, 9), was September 28, 1944. The state-

ment is challenged as a suggestion that he was discharged twelve days after he was notified to report for duty, but the alleged fact is that he was not actually discharged until four months later. The date May 25, 1944, is alleged to be the date of declaration of vacancy of his employment pursuant to Rule 39 of the collective labor agreement, which rule pertains to the loss of seniority but has no application to discharge from employment (R. 5).

The statement of the case should be augmented to include the following recital:

(1) This is a suit for alleged wrongful discharge of plaintiff from defendant's employ (R. 8, 10, 12).

(2) The complaint sounds in tort (R. 7, 8, 12).

(3) The Brotherhood is not a party to the suit.

(4) Neither the Constitution nor laws of the United States are involved, as plaintiff invokes only the State Constitution and laws (R. 5, 7, 8).

(5) The gist of the complaint is that defendant violated *Section 43-1508, Arizona Code Annotated, 1939,* and that plaintiff has a claim thereunder (R. 6, 7, 8).

(6) Judgment of dismissal of the suit was entered after plaintiff declined to plead further (R. 33).

## SUMMARY OF ARGUMENT

(1) **No legitimate issue exists as to seniority rights and exemplary damages,** because these matters relate to the measure of damages and are subjects for consideration only in the event that an actionable claim is stated, and for the further reason that plaintiff

sues for alleged wrongful discharge and not for loss or impairment of seniority rights while remaining in service. (Page 4, *infra.*)

(2) **No claim upon which relief can be granted is stated, when the complaint fails to plead facts sufficient to show that defendant has committed a legal wrong,** because the *Federal Rules of Civil Procedure* do not sanction the practice of pleading without essential details. (Page 7, *infra.*)

(3) **The complaint fails to allege facts sufficient to show that defendant breached any contractual right of plaintiff,** because it does not allege any contract, nor substantial performance, nor offer to perform on plaintiff's part, nor any breach of contractual duty. (Page 11, *infra.*)

(4) **The complaint fails to allege facts sufficient to show that defendant committed any tortious wrong,** because it attempts to state a claim, not for wrongful interference by a third party, but against the employer, without showing any duty on the employer's part to retain the employee in service, and showing on its face that plaintiff was discharged for cause of his failure and refusal to work. (Page 13, *infra.*)

(5) **It appears from the face of the complaint that Section 43-1508, Arizona Code Annotated, 1939, is inapplicable,** because the letter of the law does not reasonably include the state of facts alleged, and for the further reasons that it purports to make illegal any encouragement, aid or assistance to an employee engaged in political activities, and is intended to safeguard elections for the public benefit only. (Page 20, *infra*).

(6) **If Section 43-1508, Arizona Code Annotated, 1939, should be construed as applicable, then it would deny to defendant due process of law and the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to the Constitution of the State of Arizona,** in that it would be so vague and uncertain as to be wholly speculative in scope and operation, and would constitute an unwarranted interference with the right and liberty of contract, and would discriminate unreasonably against corporations in favor of individuals and associations of individuals. (Page 27, *infra.*)

## ARGUMENT

(1) **No legitimate issue exists as to seniority rights or as to exemplary damages.**

The motion to dismiss challenged the sufficiency of the complaint to state a claim upon which relief can be granted. It had no application to such questions as to the measure of relief, nor as to how that measure was pleaded, should it appear from the complaint that an actionable claim was stated. Yet plaintiff devotes extensive argument applicable solely to the measure of damages.

Plaintiff's argument under his proposition (b) is devoted almost exclusively to the contention that seniority rights are property rights (Br. 18 to 23). Unquestionably, such rights, if shown to exist, are valuable rights for the wrongful destruction of which an action will lie. Here, however, plaintiff sues for alleged wrongful discharge from employment, not for destruction or impairment of seniority rights while being retained in employment.

The Arizona case (Br. 18, 19) was instituted to determine and to restore seniority rights of existing employees under a collective labor agreement. The element of wrongful discharge was not present. The court stressed this distinction by pointing out that no unwilling employer was being required to employ certain individuals and that there was no attempt to interfere in the slightest degree with the employer's right to discharge, but only that the employer was required to live up to the contract of employment so long as it retained the individuals in service.

The group of cases cited at the top of page 20 hold that seniority rights arise out of the contract of employment—the collective labor agreement—and that individual employees, being bound by the collective agreement, are entitled to enforce seniority rights thereunder as under a contract made for their benefit, but they also hold that the union party to the agreement has the power by agreement with the employer to define, limit, modify or destroy such rights. Here, plaintiff pleads only Rule 39 of the collective labor agreement, and that it was not binding upon him (R. 5,6). He doesn't claim rights of seniority under the collective agreement, but denies its application. True, on this appeal he ignores those allegations, and under his proposition (a), which will be referred to hereinafter, seeks to invoke Rule 39 for his benefit. Assuming that this is permissible practice, his complaint is otherwise inadequate, for it does not plead the contract of employment, either in *haec verba* or in substance. To state a claim for loss of seniority rights, or of other employment benefits, the complaint must show a valid contract of employment, and a full statement of how and when such rights

were fixed and the conditions, nature and extent thereof.

*Austin v. Southern Pac. Co., (1942) 50 C. A. 2d 292, 123 P. 2d 39;*

*Swank v. Young, 60 Ariz. 18, 130 P. 2d 918;*

*Davis v. Davis, (1926), 197 Ind. 386, 151 N. E. 134.*

Incidental to his argument to the effect that seniority rights are valuable property rights, plaintiff refers to two opinions of the Supreme Court of the United States holding that the right to work is protected by the Fourteenth Amendment to the Constitution of the United States (Br. 20, 21). These have no application for the reasons: first, that plaintiff has not invoked the protection of the Fourteenth Amendment, but only of the State Constitution and laws (R. 5, 7, 8); second, the Fourteenth Amendment may be invoked only as against state action; and, third, even an unlawful denial by state action of a right to seek or to obtain a state political office is not actionable under the Fourteenth Amendment. *Snowden v. Hughes, (1944) 321 U. S. 1, 64 S. Ct. 397, 88 L. ed. 497.*

Plaintiff's argument under his proposition (e), other than the axiomatic statement regarding compensatory damages, is exclusively devoted to a discussion of his alleged right to recover exemplary damages (Br. 37 to 40). These he seeks for alleged reckless disregard of contractual rights and for alleged inexcusable violation of the penal statute, and for the alleged conspiracy between the Brotherhood and defendant. In this respect, he overlooks the fact that exemplary damages are not to compensate for

injury, but constitute a penalty over and above actual damages, and that they cannot constitute the basis of a claim for relief, but are merely incidental to an actionable claim when stated and established.

*Collier v. Stamatis, Ariz., (1945) 162 P. 2d 125, 128.*

*Alexander v. Jones, D. C. Okla., (1939) 29 F. S. 690;*

*25 C. J. S. 713, 714, Sec. 118.*

(2) **No claim upon which relief can be granted is stated, when the complaint fails to plead facts sufficient to show that defendant has committed a legal wrong.**

Plaintiff's chief contention is asserted under his proposition (f) to the effect that, under the *Federal Rules of Civil Procedure,* he is not required to allege facts sufficient to constitute a cause of action (Br. 40 to 43). He also asserts (Br. 43) that even if these rules were not in effect, the motion to dismiss (demurrer) should not have been sustained. In this latter respect, it is interesting to note that *Picking v. Pennsylvania R. Co.* deals with these rules, and that the two Supreme Court cases, which deal with the former Equity Rules, merely hold that when a bill of complaint (not a demurrer nor motion to dismiss) attacks a statute as being unconstitutional, it is inexpedient to determine grave constitutional questions on demurrer or motion to dismiss if there be reasonable liklihood that the production of evidence will make that answer to the question clearer.

Whether or not these rules require statement of a cause of action in the technical sense employed in

common law pleading is not important. Some of the cases cited by plaintiff either state or infer that such a statement is not required. On the other hand, the opinion in *Picking v. Pennsylvania R. Co.* (Br. 43) is replete with reference to a cause of action, and expressly holds that:

> " * * * The plaintiffs have stated a valid cause of action rising under R. S. Section 1979 insofar as the individual defendants are concerned." *(151 F. 2d 249.)*

Morcover, the Supreme Court of the United States, in *Gibbs v. Buck, (1939) 307 U. S. 66, 59 S. Ct. 725, 83L. ed. 1111* has said:

> "The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. * * * " *(307 U. S. 76.)*

To the same effect is *American Viscose Corporation v. Rothensies, 3 Cir., (1941) 121 F. 2d 186, 188.*

Plaintiff cites cases from the 2nd, 3rd, 5th, 6th and 7th Circuits, and also one Supreme Court case which is not even remotely in point *(Br. 41, 42)*. Most of these refer to *Leimer v. State Mut. Life Assur. Soc. Co., 8 Cir., (1940) 108 F. 2d 302,* wherein, as is true of the cases cited, the court was concerned solely with the sufficiency of statement in a particular pleading. In the *Leimer* case, the issue arose as to the aptness of statement of facts to substantiate a legally sufficient statement of the claim, as is apparent from the court's language to the effect that the motion to dismiss for failure to state a claim takes the place of the former demurrer, and serves a useful purpose

when directed to a complaint based upon a wrong for which there is no remedy, or upon a claim which the complainant is without right to assert and for which no relief could possibly be granted to him, *(108 F. 2d 305, 306)*.

Amongst the 5th Circuit cases cited by plaintiff, the opinion in *DeLoach v. Crowley's, Inc.,* points out that a complaint clearly without merit is subject to attack by a motion to dismiss, and that the want of merit may consist of absence of law to support the claim, or of facts sufficient to make a good claim, or in disclosure of facts which will necessarily defeat the claim.

*American Viscose Corporation v. Rothensies* and *Picking v. Pennsylvania R. Co., ante,* illustrate how the 3rd Circuit has spoken on other occasions. In the former, the court states that the motion to dismiss is equivalent to a general demurrer, admitting facts well pleaded, and presenting the question whether or not the complaint states a cause of action and permitting the raising of a constitutional question.

One of the 7th Circuit cases cited, *Burley v. Elgin, J. & E. Ry.,* deals with a motion for summary judgment, but the opinion points out that the complaint stated a prima facie cause of action for violation of a collective labor agreement. In *Vilter Mfg. Co. v. Loring, 7 Cir., (1943) 136 F. 2d 466, 468,* the same court holds that the question presented by a motion to dismiss is whether the complaint states a cause of action.

No cases are cited from the 9th Circuit, and it is assumed that this court has not spoken on the subject. However, *Rule 8(a), Federal Rules of Civil Pro-*

*cedure,* requires the complaint to contain a short and plain statement of the claim *showing that the pleader is entitled to relief,* and *Rule 12 (b)* authorizes a motion to dismiss for failure to state a claim *upon which relief can be granted.* Certainly, no less than the express requirements of these rules is contemplated. These rules are identical with the rules of pleading in the State of Arizona, as set forth in *Sections 21-404 and 21-429, Arizona Code Annotated, 1939.* The Arizona Supreme Court construes them as requiring the complaint, as against a motion to dismiss, to state a cause of action in the code-pleading sense and disapproves a construction thereof which would open the door to pleadings without the essential details. *Malin v. Southern Pac. Co., (1944) 154 P. 2d 790.* A logical explanation of the effect of these rules is made in *Sutton v. Eastern Viavi Co., 7 Cir. (1943) 138 F. 2d 959, 960,* as follows:

> "At the risk of undue prolixity, we refer to rules elementary in character and ancient in procedural law, but retained in modern practice. Under Rule 12(b) of Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, failure to state a complaint upon which relief can be granted can result only in allowance of a motion to dismiss. No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed, or omits an averment necessary to establish the wrong or fails to so link the parties with the wrong as to entitle the plaintiff to redress. * * * "

Tested by the language of the rules, or by any announced judicial construction thereof, plaintiff's

complaint does not state a claim against defendant upon which relief can be granted.

(3) **The complaint fails to plead facts sufficient to show that defendant breached any contractual right of defendant.**

Plaintiff does not allege any contract of employment. He does not allege any breach by defendant of any right founded upon contract. The only recitals bearing upon contract concern Rule 39 of the collective labor agreement, which rule relates to leave of absence only insofar as seniority rights are concerned, and as to which he alleges the same was not binding upon him. In view of his allegations, and for the further reason that most of the legal principles which govern this controversy are applicable in tort as well as in contract, the only justification for this separate treatment of the contract angle is the confusion injected by plaintiff's specification of error No. III, and in his statement No. 2 of points relied upon, and in his argument under his proposition (a), (Br. 10, 11; 14 to 17; R. 33).

In this argument, plaintiff concedes that defendant was bound by the collective agreement, and that he, likewise, was bound thereby, and he cites cases (Br. 16, 17) which support such concession and which also uphold the right of an employee in service after the adoption of such an agreement to sue upon that agreement. Then he indulges in the fallacy of contending that Rule 39 imposed an obligation on defendant's part to grant his request for extended leave of absence and that he was prematurely discharged under Rule 39.

The argument is inconsistent with his pleadings in several respects. Rule 39 deals only with seniority rights, not with duration or termination of service. He alleges that it had no binding effect upon him. Rule 39 does not even purport to require defendant to retain anyone in its service, nor to require defendant to grant or to extend leave of absence for illness, or otherwise. Rule 39 leaves it optional with defendant to grant leave of absence, or to extend such leave, subject only to the qualification that seniority rights will be jeopardized in the event of a grant of extended leave for longer than ninety days for cause other than illness, unless arranged for by agreement between defendant and the Brotherhood. Plaintiff does not allege, nor show that he endeavored to secure extended leave in the manner specified by Rule 39.

For all of these reasons, and because nothing in the record justifies his argument, there is no logic nor merit in his unqualified statements that "plaintiff was entitled, in all events, to leave of absence without limitation of time because of illness", and that defendant was "required" to start his leave on March 29, 1944, and that "defendant prematurely discharged plaintiff" (Br. 17).

*McGlohn v. Gulf S. I. R. R.* (Br. 16), is illustrative of the group of cases cited. It deals only with the collective labor agreement and holds it is in the nature of rules governing the employment and that neither it nor any individual employment governed thereby is terminable save in the manner therein prescribed. It is worthy to note that the complainant pleaded a contract of employment, performance on his part, with fidelity and dispatch, his willing-

ness to continue such performance, his working terms and the seniority rules.

Plaintiff clearly understands that, whatsoever application Rule 39 may have, it does not impose any positive duty upon defendant, for he alleges that he "obtained a leave of absence", and defendant "granted" a ninety-day leave, and he "requested an extension" thereof, (R. 4; Br. 14 to 17).

(4) **The complaint fails to allege facts sufficient to show that defendant committed any tortious wrong.**

(a) **General consideration.**

That plaintiff sought to state a claim in tort, appears not only from the allegation of his complaint, but also from his specification of error No. IV, his statement No. 3 (a) of points relied upon, and his argument, and particularly his proposition (e), which he connects with all specifications of error (Br. 12 to 14; 23 to 27; 37).

This is not an action against the Brotherhood, nor some other third party, for wrongful interference with the employment relationship. The Brotherhood is not even a party to the suit. If the Brotherhood were the defendant, and if it were shown to be guilty of wrongful acts which were not committed in the legitimate exercise of its own rights, and which induced the employer to deprive the employee of seniority rights or to discharge him from service, it would be answerable in tort in a proper case.

Wrongful discharge, even pursuant to malicious motive, unaccompanied by an act of trespass with

force, does not form the basis of a tort action by an employee against his employer.

*Elmore v. Atlantic Coast Line R. Co., (1926) 191 N. C. 182, 131 S. E. 633;*

*May v. Tide Water Power Co., (1929) 246 N. C. 439; 5 S. E. 2d 308;*

*Manley v. Exposition Cotton Mills, (1933), 47 Ga. App. 496, 170 S. E. 711.*

These cases also hold that, unless a definite period of time extending beyond the date of discharge, is provided in the employment contract, that contract is terminable at the will of either party thereto without liability to the other contracting party. This is the general rule, regardless of whether the suit sounds in contract or in tort. Illustrative of its application to an action in contract is *Louisville & N. R. Co. v. Wells, (1942) 289 Ky. 700, 160 S. W. 2d 16;* illustrative of its application to an action in tort are:

*Bell v. Faulkner, Mo. App., (1934) 75 S. W. 2d 612;*

*Clark v. Cincinnati N. O. & T. P. Ry Co., (1935) 285 Ky. 197, 79 S. W. 2d 704;*

*Speegle v. Board of Fire Underwriters, (1945) C. A. 2d, 158 P. 2d 426.*

Plaintiff does not plead the contract of employment, nor any obligation on defendant's part to retain him in service for any fixed period of time. He merely pleads (and then only incidental to the matter of seniority rights) that, at the time of his discharge, he had been employed by defendant for approximately twenty-seven years and that he had ac-

cumulated valuable seniority rights of which he was deprived when discharged, (R. 8, 9).

Plaintiff quotes from *35 Am. Jur. (Master and Servant), Sec. 19, p. 456* to the effect that where no definite term of employment is expressed, there is no inflexible rule governing the duration of the relationship, and that if the contract was made with reference to a general custom or business usage, it is not indefinite as to duration if such custom or usage fixes the term (Br. 22). The object of so quoting is not apparent, for the plaintiff pleads no general custom nor business usage, and the quotation is followed by the following:

> " * * * According to the general rule as laid down by a majority of the courts, however, contracts of employment which mention no period of duration, which are in a true sense indefinite and without stipulation for an implied minimum period, are deemed terminable at will of either party; and the burden of proving the contrary must be assumed by the party who asserts that the employee is engaged for a definite period. * * * " *(35 Am. Jur. 457, 458, Sec. 19.)*

In *Clark v. Cincinnati, N. O. & T. P. Ry. Co., ante,* the court, in sustaining a demurrer to a complaint filed by a railroad section hand, alleging that the railroad employer and its agents wrongfully discharged him, said:

> "The petition here attempts to set up nothing more nor less than an action for damages. It does not contain sufficient averments to allow the court to consider a plea for a restoration of appellant's former position. The prayer of the

> petition exemplifies the lack of pleading looking to any such relief. Damages are sought in the sum of $750 for loss of appellant's job as section hand for more than five years, in addition to incidental rights and privileges 'under Rules and Regulations of the defendant railway company'. In order to sustain a claim for damages for the wrongful discharge of an employee, it should be made to appear that a valid contract for such employment in fact existed at the time of his discharge. It should be shown that such contract was entered into for a definite period of time; and likewise should show obligation on the part of the employee to render service for a fixed period and reciprocal obligation on the employer's part to retain the employee's services. * * * " *(79 S. W. 2d 706.)*

In *Speegle v. Board of Fire Underwriters, ante,* the court sustained a demurrer to a complaint for wrongful interference with insurance agency contracts, on the ground that an allegation of "permanent" employment amounts to an allegation of employment of indefinite time, terminable at will.

Plaintiff's allegations on information and belief that defendant and the Brotherhood, through officers and agents, conspired to deprive plaintiff of the opportunity to seek public office (R. 9, 10), add nothing to his complaint. The names or identities of such officers and agents are not disclosed, and there is no allegation that any act was done pursuant to the alleged conspiracy which would result in liability here. Confederation and conspiracy cannot charge an actionable wrong, if actionable wrong is not otherwise alleged.

*Johnson v. East Boston Sav. Bank, (1935) 290 Mass. 441, 195 N. E. 727;*

*Lambert v. Georgia Power Co., (1936) 181 Ga. 624, 183 S. E. 814;*

*State of Missouri v. Fidelity & Casualty Co., 8 Cir., (1939) 107 F. 2d 343;*

*Savage v. Western Union Telegraph Co., (1945) 32 S. E. 2d 785;*

*Speegle v. Board of Fire Underwriters, ante.*

In *Johnson v. East Boston Sav. Bank* a demurrer was sustained to a complaint filed by a bank clerk, seeking to hold several defendants liable in tort for alleged illegal conduct pursuant to conspiracy by making it appear that he was discharged for dishonesty. The court applied the general rules that an action in tort would not lie against the bank for wrongful discharge, and that an act which affords no ground for action in tort if done by one person, is not actionable if done by several persons pursuant to conspiracy.

In *Lambert v. Georgia Power Co.* a demurrer was sustained to a complaint against an employer and a labor union, charging wrongful discharge pursuant to a conspiracy, because the complaint failed to allege a fixed term of employment and because conspiracy, although wrongful in motive, to effect what one has a legal right to do is not actionable.

It may be that the allegations as to conspiracy were inserted only for the purpose of laying a foundation for punitive damages, as is indicated from the fact that it is only in connection with such mat-

ter that plaintiff mentions such allegations, (Br. 39, 40).

(b) **It appears from the face of the complaint that defendant was discharged for cause.**

Plaintiff does not allege, nor does he argue that he was discharged while rendering service, or even part-time service, in the duties of his employment. His complaint is that he was discharged for failure to report for duty after being ordered to do so (R. 4). He infers that defendant's order was pursuant to Rule 39 of the collective labor agreement (R. 4), but Rule 39 (R. 5) pertains to seniority rights. He alleges Rule 810 of defendant's General Rules and Regulations (which rule he does not endeavor to tie in with the collective agreement), as follows:

> "Employees must not engage in any other business without permission from proper officer. They must report for duty at the prescribed time and place and devote themselves exclusively to their duties during prescribed hours." (R. 6; Br. 7.)

This rule and defendant's instruction to plaintiff to report for duty were reasonable, and it was plaintiff's duty to heed and to follow them. The employee's services during business days and hours belong to his employer, *35 Am. Jur. 515, 516, Sec. 85.* A contract of employment presupposes that the employee will continue to make substantial performance, *Bank of America Nat. Trust & Sav. Ass'n., etc., v. Republic Productions, Inc., (1941) 44 C. A. 2d 651, 112 P. 2d 972.* The employee's promise to comply with all reasonable rules governing his employment is implied, *Adams v. Southern Pac. Co., (1928)*

*204 Cal. 63, 266 P. 541, 57 A .L. R. 1066.* It must be deemed that an employee was rightfully discharged, where it appears that he was unable or unwilling to devote his time and attention to his duties, *35 Am. Jur. 481, Sec. 49.*

Plaintiff's allegations are quite similar to the situation which confronted the Missouri Supreme Court on the pleadings and the evidence in *Joslin v. Chicago, M. & St. P. Ry. Co., (1928) 319 Mo. 250, 3 S. W. 2d 352.* There an engineer for one railroad sued another railroad in tort, praying for compensatory and punitive damages, for inducing his employer to discharge him by threat of denial to his employer of use of the inducer's tracks. Judgment in his favor was reversed on the ground that, under the pleadings and the evidence, verdict should have been directed for the employer. In so doing, the court said:

> " * * * On March 11, 1924, Superintendent Moore advised plaintiff by letter that his request for an extension of his leave of absence was inconsistent, and notified plaintiff that 'it will be necessary for you to report for duty if you expect to retain your seniority'. Plaintiff failing to report for duty in compliance with the written instruction and order of Superintendent Moore, that officer finally dismissed plaintiff from the service of the employer railroad company on April 20, 1924, several weeks after the commencement of his action against the defendants herein. The evidence is positive and conclusive that plaintiff's final and ultimate discharge and dismissal from the service of his employer was occasioned solely by reason of his

failure to report for duty under the instructions of his superintendent, Moore, conveyed to him by letter on or about March 11, 1924. Had plaintiff reported for duty pursuant to such instructions, he apparently would have preserved and maintained his seniority rights as an engineer, and, so far as the record before us discloses, plaintiff would have been retained in the service of the Missouri, Kansas & Texas Railway Company." *(3 S. W. 2d 364.)*

It appears from plaintiff's complaint that he did not perform, nor offer to perform substantially, or at all, the duties of his employment, that he disregarded and refused to comply with a reasonable rule of his employment and with his employer's reasonable instructions, and that, in lieu of performance and compliance, he elected to devote all of his time, talents and energies to the conduct of his political campaign. This was a breach by plaintiff of such contract of employment as may have existed. That breach warranted his dismissal from service, and he was discharged by reason thereof.

(5) **It appears from the face of the complaint that Section 43-1508, Arizona Code Annotated, 1939, is inapplicable.**

The Arizona statute invoked by plaintiff—*Section 43-1508, Arizona Code Annotated, 1939,*—makes it a misdemeanor for a corporation employer to influence the ballot of an employee, or to contribute to an employee holding public office, or to "*encourage, aid, or assist* an employee in running for public office", or to "*make, enforce, or attempt to enforce any order, rule or regulation, or adopt any other device or*

*method",* to prevent an employee from engaging in political activities, or from running for, or holding public office. It is a penal statute, apparently enacted to safeguard elections, and is contained in *Article 15, Chapter 43, of the Code,* entitled "Elections". It is prohibitive in nature, and does not impose any affirmative duty upon the corporation. It purports to prohibit encouragement, aid or assistance to an employee seeking office just as it purports to prohibit the enforcement of a device to prevent one from seeking office, and to impose a penalty no less severe in the one case than in the other. It does not expressly vest any right of civil action in an employee, or others, for violation of its prohibitions. It has not been construed by the Arizona Supreme Court.

Plaintiff invokes the statute, by allegations to the effect that he was wrongfully discharged in violation of his rights thereunder (R. 6 to 8). This vague conclusion is not clarified by his argument, for when he discusses his specification of error No. IV (Br. 12), under his propositions (c) and (d), he merely makes the bold assertion that he was discharged in direct violation of the statute (Br. 24), and then confines his attention to his contentions that the statute does not violate the Constitution of the United States and should be so construed as to permit a civil remedy (Br. 23 to 27).

It must be assumed, therefore, that he invokes such portion of the statute which purportedly prohibits a device to prevent him from running for office, and that it is his contention that either Rule 39 of the collective labor agreement, or defendant's General Rule 810, or both of them, constituted the device.

Neither Rule 39 nor General Rule 810, the former dealing with seniority rights and the latter dealing with service during business hours, purports, or can be construed to be a device or method to interfere with political activities. Both are reasonable rules of employment. Rule 39, as shown hereinbefore, does not relate to term or termination of service, and General Rule 810 merely requires employees to report for duty and to devote themselves exclusively to that duty during business hours. Had defendant granted extended leave of absence to plaintiff under Rule 39, or otherwise, upon his application *"to conduct and continue his campaign"* (R. 3; Br. 5), it would have offended that portion of the statute against rendering encouragement, aid or assistance. It cannot be assumed, and plaintiff does not allege that he was required to devote the whole of his time and energies, or to refuse to report for duty when so ordered, or to remain absent during business hours, in the conduct of his political campaign, and so General Rule 810 cannot be held to infringe the statute.

Furthermore, it appears from the allegations of the complaint and from facts which will be judicially noticed that plaintiff was not discharged until September 28, 1944, (R. 3, 4, 8, 9), and that he was not prevented from engaging in political activities, or accepting candidacy for office, or from conducting his campaign; he did engage in such activities during that part of 1944 referred to in his complaint and did accept candidacy on the Democratic ticket for nomination to the office of Governor of the State of Arizona, and did conduct and continue his campaign for nomination until he was defeated and an-

other candidate was duly nominated on said ticket for said office by the voters of the State at the State primary election held and determined on July 18, 1944, all prior to the date of his discharge from defendant's employ.

*Brown v. Piper, (1875) 91 U. S. 37, 23 L. ed. 200;*

*Richardson v. McChesney, (1910) 218 U. S. 487, 31 S. Ct. 43, 54 L. ed. 1121;*

*Picking v. Pennsylvania R. Co., (Br. 43);*

*Louisiana Farmers' P. U. v. Great Atlantic & Pacific T. Co., D. Ct. Ark., (1941) 40 F. S. 897.*

There is no language in *Section 43-1508,* which would lend support to the contention that the discharge of an employee, under no fixed term of employment and for cause of his failure and refusal to report for duty, or to render substantial service, when so required by reasonable rule and order, amounts to a violation which would authorize him to sue for damages. If there were, then, as said by the Supreme Court in *Church of the Holy Trinity v. United States, (1892) 143 U. S. 457, 472, 12 S. Ct. 511, 36 L. ed. 226* (construing a Federal law against contracting aliens):

> " * * * It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute."

The letter of the law does not *reasonably* include the state of facts and conclusions stated in the complaint.

The Arizona statute governing the construction of *Section 43-1508* is set forth in *Section 43-102, Article 1, Chapter 43,* of the Code, and reads as follows:

> "**43-102. How construed.** The provisions of this Code, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments. The rule of the common law that penal statutes are to be strictly construed, has no application to this Code; *its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.* No part of this code is retroactive, unless expressly so declared." *(Emphasis supplied.)*

Although the common law rule of strict construction is not to be applied, the courts are not permitted to extend the language of *Section 43-1508* by implication. In this respect, the Arizona Supreme Court, in *State v. Behringer, (1918) 19 Ariz. 502, 172 P. 660, 661,* involving a criminal prosecution for wire-tapping, said:

> "It is urged by the prosecution that under a liberal construction, which is not only authorized, but enjoined, in construing penal statutes (section 5, Penal Code), section 692 would cover the acts alleged in the information. If by a 'liberal construction' it is meant that the courts can extend the meaning of the language used by the Legislature to include all cognate or related acts to those actually condemned, the contention is plausible; but, as we view it, we are not permitted to go that far. *If the letter of the law clearly excludes the state of facts propounded*

*in the pleading, or does not reasonably include them, even though they be within the reason and policy of the legislation, the courts cannot, by implication or construction, declare a person charged with them guilty of a crime. * * * " (Emphasis supplied.)*

There is serious doubt, assuming for the sake of argument that the letter of the law does include the state of facts and conclusions stated in the complaint and is valid, that *Section 43-1508* can be invoked here, or is within the argument and line of cases cited by plaintiff (Br. 32 to 37). It imposes no duty, gives no right of action, and is designed, at least primarily, for the benefit of the public.

In *Cheek v. Prudential Insurance Co.,* relied upon extensively by plaintiff (Br. 32 to 36), the statute under consideration, rather than being purely prohibitive in language, imposed a positive duty upon the corporation, which duty the court regarded as for the benefit of a class of individuals, of which class the complainant was a member. In *Lockheed Aircraft Corporation v. Superior Court, etc.* (Br. 36), the statute discussed specifically provided that nothing therein should prevent an injured employee from recovering damages.

Notwithstanding the Missouri Supreme Court's opinion in the *Cheek* case, the Missouri Appellate Court, in a later case, *Bell v. Faulkner, Mo. App., (1934) 75 S. W. 2d 612,* reversed a judgment recovered by a dairy employee against the dairy for compensatory and punitive damages for alleged wrongful discharge under a statute making it unlawful for officers and agents of officers and agents of a corpora-

tion to coerce or to intimidate its employees in voting for any candidate. Reversal was due to the error of the lower court to instruct the jury that the employer had the right, without subjecting itself to civil liability, to discharge, with or without cause, an employee who did not serve under a contract of employment for a definite term. The appellee, relying upon the *Cheek* case, contended on appeal that his discharge was a direct violation of the statute, and that it should be construed so as to authorize a civil action, but the court disposed of this contention by an analysis of the distinction between the statutes involved; in the *Cheek* case *imposing a positive* duty to provide service letters at time of termination of service, and in the *Faulkner* case, prohibiting coercion and intimidation in voting.

The *Faulkner* case is only slightly weakened as a precedent, by the circumstances there that the statute made only the act of the corporation's agents and officers unlawful, and imposed only a penalty of imprisonment.

In the *Lockheed* case, the question was whether or not a peremptory writ of prohibition should issue against proceedings under a subpoena duces tecum. The pleadings referred to provisions of the California Labor Code, somewhat similar to *Section 43-1508, Arizona Code Annotated, 1939,* but pertaining more particularly to "labor" than to "elections", and containing no prohibition against encouragement, aid or assistance as in the Arizona statute. The rules, regulations and policies of Lockheed which were challenged in the complaint are not set out in the opinion, and the court found that they "manifestly" contra-

vened the Labor Code, whereas the Southern Pacific Company rules pleaded in the instant case cannot, reasonably, be found "manifestly" nor remotely to violate the Election law.

(6) **If Section 43-1508, Arizona Code Annotated, 1939, should be construed as applicable, then it would deny to defendant due process of law and equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States and to the Constitution of the State of Arizona.**

(a) **Denial of due process of law.**

To read into *Section 43-1508* a legislative intention to make it unlawful for a corporation employer to discharge an employee for failure and refusal to render substantial performance when so required by employment rules of general application, or even to make it unlawful for the employer to grant, or to extend leave of absence to an employee electing to devote all of his time and efforts to the conduct of a political campaign, would offend the due process clauses of the United States Constitution and the Constitution of the State of Arizona in two particulars: The statute would be so vague and uncertain in its application as to require the employer, at its peril, to speculate as to its meaning; and it would constitute an unwarranted interference with its right and liberty of contract.

(i) Under elementary principles of law previously stated herein, the employment relationship imposes an obligation upon the employee to make substantial performance and to comply with all reasonable rules governing the employment, just as it imposes certain

obligations upon the employer, and, where it appears that he is either unable or unwilling to devote his time and attention to his duties, he may be discharged without liability on the part of the employer. The act of discharge, under such circumstances, has never been regarded as reprehensible. To hold that such an act becomes reprehensible when done subsequent to a denial of leave of absence to conduct a political compaign, especially in view of the condemnation of the statute against encouraging, aiding or assisting an employee in running for office, would place the corporation in a confused and perilous situation. It would not have any idea as to what policies, acts and employment rules would be permissible, and it would, in formulating policies, adopting rules and performing acts, proceed at peril of prosecution and civil suit.

The Arizona statute, even without such a forced and strained interpretation, is vague as to what orders, rules or regulations will constitute a device or method to prevent employees from engaging in political activities, and it prescribes no standard, as to what conduct will constitute rendering encouragement, aid and assistance. It is unlike the provision of the Labor Code discussed in the *Lockheed* case (Br. 36), which does not purport to penalize encouragement, aid or assistance, and which the California Appellate Court regarded as sufficiently definite that people of common sense and reason would experience no difficulty in determining with a reasonable degree of certainty what was intended by the Legislature.

Here, we find that at least as early as 1940 rules of employment were adopted, limiting defendant's

right to grant or to extend leave of absence without jeopardizing seniority rights, and requiring all employees to report for and devote themselves to duty during business hours. There was nothing in *Section 43-1508* which would indicate to defendant that these rules would be held to be unlawful for not containing exceptions to cover political activities. In 1944 plaintiff, one of its employees, announces that he is a candidate for public office, and requests leave of absence to conduct his campaign. Rule 39 neither required nor prohibited defendant to grant such request, but it placed plaintiff in jeopardy of preserving seniority rights if the request were granted. General Rule 810 required all employees to work during business hours, but had no application as to plaintiff at other times. *Section 43-1508* apparently made it unlawful to grant extended leave for such purpose. Leave of absence for the purpose was denied, and plaintiff was instructed to return to work. He failed and refused to do so, and thereby disregarded the employment rules and his employer's orders. He devoted all of his time and efforts to that campaign, or at least to some object other than his employment duties, and failed to attain nomination to office on July 18, 1944. Thereafter, on September 28, 1944, he was discharged. There was nothing in the language of *Section 43-1508* to indicate that this was unlawful, or would subject defendant to civil or criminal liability therefor.

It is not necessary to consider whether or not *Section 43-1508* is definite and certain and sufficently explicit to have informed defendant what conduct on its part would be unlawful, or whether or not *Section 43-1508* is unlike the statute stricken down in

*State v. Menderson,* as asserted in plaintiff's argument (Br. 30). The issue at this point arises over the validity of *Section 43-1508,* if construed to be applicable to the facts of this case. The statute in the *Menderson* case purported to make it felonious for an employer to discharge an employee for membership in any organization, without expressly mentioning a labor union. A demurrer was sustained to an information charging that Menderson discharged an employee because of the latter's union affiliation, on the ground that the statute under which the prosecution was instituted was, by reason of vagueness and uncertainty, repugnant to the due process clauses of the Federal and State Constitutions. In so doing, the Arizona Supreme Court found that some of the things therein forbidden were within the legislative power, while others were not, that the act charged in the information fell within the literal language of the statute, and it held that when the Legislature declares an offense in words of indeterminate signification, or when its language is so general and indefinite that it may embrace acts commonly recognized as reprehensible as well as other acts which are not to be presumed to be made unlawful, it denies due process of law to those who are entitled to be informed in advance of action as to what is commanded or forbidden, as no one can be required at peril of liberty and property to speculate in advance as to the scope and meaning of a penal statute, *State v. Menderson, (1941) 57 Ariz. 103, 111 P. 2d 622.* These are some of the principles invoked by defendant in its motion to dismiss.

(ii) Freedom of contract, as to terms, conditions and duration of employment, is the rule, and lawful

state interference is the exception. The Supreme Court cases of *Prudential Insurance Co. v Cheek* and *Chicago, R. I. & P. Co. v. Perry,* cited by plaintiff (Br. 25 to 29) affirm this principle, and merely apply the exception under the facts there presented. The analogy between those cases and the situation here presented is only that the complainants invoked penal statutes directed to the employment relationship. The statutes were not vague and uncertain; they imposed a positive duty upon the corporation employer; that duty was to supply to the employee, upon termination of service, a letter worded as it saw fit, setting forth the employee's name and character, the duration of his service, and the ground of termination of employment; they imposed no obstacle or interference in the making or termination of employment contracts, and did not purport to require the employer to retain anyone in service nor to prevent it from dismissing an employee, with or without cause. Action was instituted, in the former case, because the employer refused to supply such a letter, and in the latter case, because the employer made false statements in a letter so supplied. The Supreme Court announced that it was not disposed to question that freedom of contract in the employment relationship is an elementary part of the rights of personal liberty and private property, not to be stricken down directly, nor arbitrarily interfered with, but that the statutes there in question did not constitute either a serious or an arbitrary interference with such freedom of contract.

Plaintiff suggests, in connection with quotations supplied from the opinions in the foregoing cases,

that the privilege of becoming a candidate for public office is a higher right than the right to receive a service letter (Br. 29). However, he was not denied that privilege, and he doesn't even allege such to be the case. A more pertinent suggestion would be that the employer's right to discharge a disobedient employee, not hired for a fixed term, is a higher right than its desire to withhold information regarding the services rendered by an employee.

The opinion of the Supreme Court of Illinois, in *People v. Chicago, M. & St. P. Ry. Co., (1923) 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610,* although not dealing with the subject of discharge from employment, upholds the doctrine that the state cannot interfere in a private employment, to the extent of prescribing the terms of service to be rendered by an employee to his employer. The court quashed an information charging an employer with deducting from an employee's wages for time lost during absence for voting at an election, although the statute purported to make it a misdemeanor to do so. The statute was held to be an unreasonable abridgment of the right of contract, and in direct conflict with the due process and equal protection clauses of the Federal and State Constitutions. The following observation in the opinion is both logical and here apropos:

> " * * * The Legislature had just as much right to require employers to pay their employees for the time they necessarily would be compelled to use in looking after any sick member or members of their family as it had to pass the provision in question. Other striking examples of

void legislation of the character in question might be stated, and in which it would appear that the employee would be engaged in a matter of pursuit equally as commendable and as essential to his own personal welfare; but further comment is unnecessary, as it is entirely clear that the provision in question is an unreasonable abridgment of the right to contract, and therefore void." *(138 N. E. 157).*

(b) **Denial of equal protection of the laws.**

If *Section 43-1508* should be construed as applicable, then it would be repugnant to the equal protection clause of the Fourteenth Amendment, and to provisions of similar purport in the Constitution of Arizona (R. 24, 25).

Under the Federal and State Constitutions, corporations may not be singled out arbitrarily so as to be subjected to burdens and perils to which individuals, firms, partnerships and associations would as appropriately be subject but which are exempt from the operation of a state statute. Legislation which is directed solely to corporations, and which eliminates from its scope individuals or associations of individuals where there is no reasonable basis for discrimination, is invalid. No citation of authority is required as to the effect of the Fourteenth Amendment on such legislation. The purpose of the State Constitution's provisions which are invoked is to secure equality of opportunity and right to all persons similarly situated.

*Prescott Courier v. Moore, (1929) 35 Ariz. 26, 274 P. 163, 165;*

*Begay v. Sawtelle, (1939) 53 Ariz. 304, 88 P. 2d 999;*

*Elliott v. State, (1926) 29 Ariz. 389, 242 P. 340.*

The Tennessee Supreme Court in *State v. Nashville, C. & St. L. Ry. Co., (1911) 214 Tenn. 16, 135 S. W. 773, Ann. Cas. 1912 D 805,* held that a statute, which made it a misdemeanor for any corporation, or its officers or agents, to discharge or to threaten to discharge an employee for voting or not voting for or against any candidate or measure, or for trading or not trading with any person or class of persons, but which did not apply to firms or individuals, was arbitrary and vicious class legislation, a grant of a special right, privilege, or immunity, a denial of this equal protection of the laws, and in contravention of the Fourteenth Amendment and of provisions in the Tennessee Constitution virtually identical with the provisions of the Constitution of Arizona here invoked.

The Arizona statute, by its terms, applies exclusively to "any corporation, its officers, or agents." No mention is made of associations, labor unions, cooperatives, firms or partnerships, constituting groups of individuals, or even of individuals (other than officers and agents of corporations). So far as the statute reads, such groups of individuals, and their officers and agents, and individuals, may do with impunity any or all of the things therein made

unlawful when done by corporations. They can, for instance, make and enforce orders, rules or regulations, or adopt other devices or methods to prevent an employee from engaging in political activities, or assuming the conduct of any political campaign, and they can instigate, aid or assist, whether by personal service or contributing money or anything of value, any employee to run for office, and they can also influence his ballot and contribute to him while he is engaged in the official duties of a public office. The statute, on its face, appears to be clear denial of the equal protection of the laws to corporations and their officers and agents, as there is no reasonable basis of classification between them and individuals and associations of individuals having equal, or greater strength under a non-incorporated form of organization. To go beyond the acts purportedly made unlawful therein, so as to read into it a legislative intention to include the circumstances set forth in plaintiff's complaint, would require every corporation to proceed at its peril, in virtually every move undertaken in or incidental to its employees, or any of them, to determine absolutely that there are no political implications directly or indirectly involved. Such construction would deny to defendant the equal protection of the laws of the State of Arizona.

## CONCLUSION

Plaintiff's complaint failed to state a claim against defendant upon which relief could be granted. It was appropriately challenged by defendant's motion to dismiss. The motion was granted. Plaintiff

elected to stand upon his complaint and refused to attempt a better statement. Judgment of dismissal was duly entered. For these reasons, defendant respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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